FILED
FEB 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1253

IN THE

Supreme Court of the United States

October Term, 1982

HERMAN SOLEM, *et al.*,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

On Petition for A Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNTIES OF DEWEY, ZIEBACH, AND CORSON, SOUTH DAKOTA; COUNTIES OF SIOUX AND MOUNTRAIL, NORTH DAKOTA; COUNTY OF LAKE, MONTANA; COUNTY OF MAHNOMEN, MINNESOTA; COUNTIES OF DUCHESNE AND UINTAH, UTAH, AS AMICI CURIAE IN SUPPORT OF PETITION

William W. Shakely
Counsel of Record
Tobin Law Offices, P.C.
Suite 1113
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 467-5712

Tom D. Tobin
Tobin Law Offices, P.C.
422 Main Street
Winner, South Dakota 57580
(605) 842-2500

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI COUNTIES	1
STATEMENT OF THE CASE	4
ARGUMENT	6
I. THIS CASE REPRESENTS A CONFLICT BETWEEN THE FEDERAL AND STATE COURTS . . .	6
II. THE DECISION OF THE COURT BELOW IS REPRESENTATIVE OF THE PRESENT CONFUSION REGARDING AN ISSUE OF NATIONAL IMPORTANCE	11
III. THIS CASE REPRESENTS A CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT.	15
A. The Court Below Failed To Use The Detailed Analysis Mandated By This Court	15
B. The Decision of The Court Below Is Inconsistent With the Decisions of This Court	17
IV. THE DECISION OF THE COURT OF APPEALS DISREGARDS MANIFEST EXPRESSIONS OF CONGRESSIONAL INTENT IN A MANNER INCONSISTENT WITH THE HOLDINGS OF THIS COURT.	21

A. Congressional Intent To Disestablish Is Plain On the Face of the Act . . . 21

1. "Reservation Thus Diminished" 22

2. "Public Domain" 25

3. School Lands. 27

4. Intoxicants Provision 28

B. The legislative History of the 1908 Act and the Surrounding Circumstances Confirm That Congress Intended To Disestablish the Areas To Be Opened 31

C. The Subsequent Treatment of the Opened Area 39

CONCLUSION 45

TABLE OF AUTHORITIES

Page

CASES:

Appawora v. Brough, 431 F.2d 901 (1977) 21
Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) . . . . . passim
Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967) 7
City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) . . . 1,13
Clairmont v. United States, 225 U.S. 551 (1912) 38
Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S.Ct. 314 (1982) 1,11,23
DeCoteau v. District County Court, 420 U.S. 425 (1975) . . . . . passim
Draper v. United States, 164 U.S. 240 (1896) 38
E.P.A. v. National Crushed Stone Assn., 449 U.S. 64 (1980) 42
Hollister v. United States, 145 F. 773 (8th Cir. 1906) . . . 38
Kills Plenty v. United States, 133 F.2d 292 (8th Cir.), cert. denied, 319 U.S. 759 (1943) 7
Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963) 8,40
Leary v. United States, 395 U.S. 6 (1969) 43
Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276 (D.S.D. 1982) 23,37

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) . 3
Montana v. United States, 450 U.S. 544 (1981) 38
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 38,44
Red Lake Band of Chippewa Indians v. United States, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980) 12
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) . . . . . passim
Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977) 14,23
Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981) 11
Seymour v. Superintendent, 368 U.S. 351 (1962) 23,26
Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977) 9,17,23,26,42
State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965) 8,40
State v. Janis, 317 N.W.2d 133 (S.D. 1982) 7,10,17,23
State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925) 8,40
State v. Williamson, 87 S.D. 512, 211 N.W.2d 182 (1973) 36
United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978), rev'd sub nom. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980) . . . . . passim
United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980) . . . . passim
United States v. La Plant, 200 F. 92 (D.S.D. 1911) 7,40

United States v. Long Elk,
565 F.2d 1032 (8th Cir. 1977). .12,14,16
United States v. National Association
of Securities Dealers, 442 U.S.
694 (1975) 42
United States v. Wounded Knee,
596 F.2d 790 (8th Cir.),
cert. denied, 442 U.S. 921
(1979) 23,24,25
United States ex rel. Condon v.
Erickson, 478 F.2d 684 (8th
Cir. 1973) . . . . . passim
United States ex rel. Condon v.
Erickson, 344 F. Supp. 777
(D.S.D. 1972), aff'd, 478 F.2d
684 (8th Cir. 1973) 8
United States ex rel. Cook v.
Parkinson, 525 F.2d 120 (8th
Cir. 1975), cert. denied,
430 U.S. 982 (1977). . . . 14,19,23,37
United States ex rel. Feather v.
Erickson, 489 F.2d 99 (8th
Cir. 1973), rev'd sub nom.
DeCoteau v. District County
Court, 420 U.S. 425 (1975). . . . 13
United States ex rel. Miner v.
Erickson, 428 F.2d 623
(8th Cir. 1970) 8
Ute Indian Tribe v. Utah, 521 F. Supp.
1072 (D. Utah 1981), appeal
pending No. 81-1901 (10th Cir.) . 1,12
White Earth Band of Chippewa Indians
v. Alexander, 683 F.2d 1129
(8th Cir.), cert. denied,
U.S. ____, 103 S.Ct. 489 (1982) . 1,11

STATUTES:

18 U.S.C. § 1151(c) 6
25 U.S.C. §§ 463 & 467, 1934 Indian Reorganization Act 6,42
Act of March 2, 1889, 25 Stat. 888 . . 4
Act of April 23, 1904, 33 Stat. 254. . 18,36
Act of April 21, 1906, 34 Stat. 124. . 36
Act of March 2, 1907, 34 Stat. 1230. . 18,36
Act of May 29, 1908, 35 Stat. 460. . . passim
Act of February 17, 1910, 36 Stat.196 28
Act of May 27, 1910, 36 Stat. 440. . . 19
Act of May 30, 1910, 36 Stat. 448. . . 18
Act of April 13, 1912, 37 Stat. 84 . . 43
Act of March 3, 1925, 43 Stat. 1184. 43
Act of February 14, 1931, 46 Stat. 1107. 43

CONGRESSIONAL MATERIALS:

S. Rep. No. 439, 60th Cong., 1st Sess. (1908) 5,32,33,34,35
H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908) 32,33,34,35
S. Rep. No. 819, 60th Cong., 2d Sess. (1909) 41,44
S. Rep. No. 518, 61st Cong., 2d Sess. (1910) 30

H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910) 30
S. Rep. No. 554, 67th Cong., 2d Sess. (1922) 44
S. Rep. No. 1115, 68th Cong., 2d Sess. (1924) 41,44

42 Cong. Rec. 7005 (1908) 28,35
45 Cong. Rec. 738-39, 1769-70 (1910) 27,28,30,43
48 Cong. Rec. 2335 (1912) 44

MISCELLANEOUS:

Presidential Proclamation of August 10, 1909, 36 Stat. 2500 5

Order of Restoration, June 12, 1941, 6 Fed. Reg. 3300. 6
Order of Restoration, January 10, 1949, 14 Fed. Reg. 471. 6
Order of Restoration, January 21, 1952, 17 Fed. Reg. 1065 6
Order of Restoration, May 17, 1957, 22 Fed. Reg. 3693 6

[1906] Comm'r Indian Affairs Ann. Rep. 80. 38

47 I.D. 340 (1920) 41
48 I.D. 453 (1922) 41
56 I.D. 330 (1938) 27,41

INTEREST OF THE AMICI COUNTIES

The counties joining in this brief all contain areas that were at one time established as Indian reservations, but which were the subject of surplus lands statutes similar to the one at issue in this case.[1] The question of whether those areas continue

---

1. Most of these areas have been the subject of decisions holding that their reservation status was not terminated. E.g., Bartlett v. Solem, 691 F.2d 420 (Dewey, Ziebach, Corson and Sioux Counties); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, _____ U.S. _____, 103 S.Ct. 489 (Mahnomen County); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, _____ U.S. _____, 103 S.Ct. 314 (1982) (Lake County); Ute Indian Tribe v.Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal pending No. 81-1901 (10th Cir.) (Duchesne and Uintah Counties); City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) (Mountrail County). The counties submit that in light of DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), these cases were incorrectly decided.

as reservations today is of great importance to the counties, because the resolution of the question of reservation status significantly affects the extent to which the states and their political subdivisions may exercise governmental authority within those areas. Thus, the principles and guidelines used by the courts in resolving questions of this type are of paramount concern to the amici counties.

In addition, the Counties of Dewey, Ziebach, Corson, and Sioux have a special interest in the outcome of this case. These four counties are included within the original boundaries of the two reservations affected by the 1908 Act of Congress at issue in this case, and each county contains a part of the area opened to settlement under

the Act.[2] A finding that the opened areas remain within the boundaries of the two reservations will divest the states and counties of much of their civil, criminal, administrative, and regulatory jurisdiction within those areas. [3] See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

---

2. This case centers on the status of the opened lands originally within the Cheyenne River Reservation in South Dakota. However, it necessarily affects as well the status of lands originally within the Standing Rock Reservation in North and South Dakota which were also opened under the 1908 Act. Dewey and Ziebach Counties lie within the original boundaries of the Cheyenne River Reservation, and Corson and Sioux Counties lie within the original boundaries of the Standing Rock Reservation.

3. For these reasons, these counties joined in a similar amicus brief filed by the State of South Dakota in United States v. Dupris, 446 U.S. 980 (1982).

STATEMENT OF THE CASE

The amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari. In addition, the counties include the following historical background to the issue presented by this case.

The original Cheyenne River Reservation was established by Section 4 of the Act of March 2, 1889, 25 Stat. 888, 889. At that time, the reservation consisted of some 2.9 million acres of land in western South Dakota. See, e.g., United States ex rel. Condon v. Erickson, 478 F.2d 684, 685 (8th Cir. 1973). In 1908, following consultations between the federal government and the Cheyenne River Sioux Tribe, Congress enacted the statute in question, which directed the Secretary of the Interior to "sell and dispose of" the unallotted lands in portions of both the Cheyenne River Reservation and the adjacent Standing Rock Reservation in

North Dakota and South Dakota. Act of May 29, 1908, 35 Stat. 460 (Pet. App. D, pp. A14-A29.) Pursuant to the provisions of the Act, an area consisting of the western portions of the two reservations and an area along both sides of their mutual east-west boundary - amounting to a little over half of the original acreage of the reservations - was opened to settlement in 1910. See S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908); Presidential Proclamation of August 10, 1909, 36 Stat. 2500.

It is important to note that this jurisdictional dispute essentially involves the opened and unrestored lands within the original reservation boundaries. There is no dispute over the fact that the unopened portion of the reservation, together with the lands later restored to reservation

status,[4] presently exist as an Indian reservation. There is also no dispute that individual Indian allotments held in trust by the federal government are "Indian country" by virtue of 18 U.S.C. § 1151(c). Thus, the lands actually at issue are primarily those owned by non-Indians.

ARGUMENT

I. THIS CASE REPRESENTS A CONFLICT BETWEEN THE FEDERAL AND STATE COURTS

As noted in the Petition, the en banc decision of the court below is in direct

---

4. Following the passage of the Indian Reorganization Act in 1934, a substantial amount of land in the opened area was restored to tribal ownership and reservation status by the Secretary of the Interior under Sections 3 and 7 of the Act, 25 U.S.C. §§ 463 and 467. Order of Restoration, June 12, 1941, 6 Fed. Reg. 3300; Order of Restoration, January 10, 1949, 14 Fed. Reg. 471; Order of Restoration, January 21, 1952, 17 Fed. Reg. 1065; Order of Restoration, May 17, 1957, 22 Fed. Reg. 3693.

opposition to the recent unanimous decision of the Supreme Court of South Dakota in State v. Janis, 317 N.W.2d 133 (S.D. 1982). To better understand this conflict, it is useful to review the history of the numerous judicial decisions regarding the issue presented by this case. In 1911, shortly after the 1908 Act had taken effect, the United States District Court for South Dakota held that the Act had the effect of reducing the reservation boundaries by excluding the area opened to settlement. United States v. La Plant, 200 F. 92 (D.S.D. 1911). This decision was cited with approval by the Eighth Circuit Court of Appeals on at least two occasions. Kills Plenty v. United States, 133 F.2d 292, 294 (8th Cir.), cert. denied, 319 U.S. 759 (1943); Beardslee v. United States, 387 F.2d 280, 286 (8th Cir. 1967) (Blackmun, J.). The interpretation in La Plant was also accepted by the

state Supreme Court in three separate decisions over the years. State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

There was thus no conflict of decision for over sixty years, and the prevailing state of the law in both federal and state courts was that the 1908 Act had diminished the size of the Cheyenne River Reservation. However, in 1972, one judge of the federal District Court, following a suggestion made in a dissent in United States ex rel. Miner v. Erickson, 428 F.2d 623, 627 n.11 (8th Cir. 1970) (Lay, J., dissenting), concluded that the opened portion of the Cheyenne River Reservation was not disestablished by the 1908 Act. United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D. 1972).

The Eighth Circuit agreed, effectively reversing the previously established precedent. United States ex rel. Condon v. Erickson, (hereinafter "Erickson") 478 F.2d 684 (8th Cir. 1973).

Further illumination of this area of the law was subsequently provided by this Court in DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In light of these decisions, the state Supreme Court re-examined the 1908 Act and concluded that it had disestablished the affected portion of the reservation. Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977). The District Court undertook a separate analysis of the question and came to the same conclusion. United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978). However, the Eighth Circuit adhered to its earlier decision in Erickson and reversed the District Court over a

vigorous dissent by Judge McMillian. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979). That judgment was later vacated by this Court. 446 U.S. 980 (1980).

In 1982, the South Dakota Supreme Court declined to follow Dupris, finding its reasoning unpersuasive, and again held that the 1908 Act did have the effect of disestablishment. State v. Janis, 317 N.W.2d 133 (S.D. 1982). The most recent development in this tortuous chronology has been the split en banc decision of the Eighth Circuit in the instant case, which reaffirmed Erickson and Dupris.[5] These two recent decisions are unequivocal and irreconcilable, and create the same sort of conflict between the federal and state courts which led this Court to grant certiorari in

---

5. Two of the seven judges of the Court dissented, believing that Erickson required modification in light of Rosebud and DeCoteau.

DeCoteau v. District County Court, 420 U.S. 425, 430-31 (1975). Because of the extensive effect of reservation status on state and local jurisdiction, this conflict has resulted in jurisdictional chaos for the area, which will continue until the matter can be finally resolved by this Court.

II. THE DECISION OF THE COURT BELOW IS REPRESENTATIVE OF THE PRESENT CONFUSION REGARDING AN ISSUE OF NATIONAL IMPORTANCE

Surplus lands acts which, like the 1908 Cheyenne River Act, opened reservation lands for non-Indian settlement, have been the subject of much litigation in recent years. See, e.g., White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 489 (1982); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S.Ct. 314 (1982); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980),

cert. denied, 451 U.S. 908 (1981); Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal docketed, No. 81-1901 (10th Cir.). Despite the principles announced by this Court in Rosebud and DeCoteau, supra, no consistent application of those principles has emerged. Instead, confusion has persisted concerning the interpretations of these statutes and their histories. Although the Rosebud and DeCoteau decisions appear to be plain enough, the analysis of those cases has been obscured or ignored in subsequent decisions. This problem of interpretation is of nationwide significance because of the many such surplus

lands statutes, involving millions of acres, which were enacted in the late nineteenth and early twentieth centuries. Further guidance from this Court is therefore needed to clarify the principles announced in DeCoteau and Rosebud and to resolve the continuing confusion in this important area of the law.

This uncertainty in interpretation is perhaps best illustrated by the recent decisions of the Eighth Circuit. Before this Court's decision in DeCoteau, the Eighth Circuit had held that three different surplus lands statutes did not have the effect of disestablishment. City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Erickson, supra; United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), rev'd sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975). Following this Court's reversal of the

Feather decision, the Eighth Circuit twice held statutes of this era to have disestablishment effect. Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). Since then, however, the court's decisions have taken a sharply different tack. Apparently viewing Rosebud and Cook as aberrations, the court has three times disregarded these decisions and reached back to its earlier decisions for guidance in finding an absence of disestablishment intent in statutes strikingly similar to those construed in Rosebud and Cook. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980); Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982).

III. THIS CASE REPRESENTS A CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT

A. The Court Below Failed To Use The Detailed Analysis Mandated By This Court.

In two relatively recent cases, this Court has outlined the proper judicial approach to questions of Indian reservation disestablishment. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). As specified by this Court, the requisite analysis involves an examination of several factors: the face of the Act at issue, its legislative history and surrounding circumstances, and its subsequent treatment by courts and government officials. Rosebud at 587, 603; DeCoteau at 442, 444. In its decision below, the Court of Appeals did not engage in the comprehensive analysis

required by Rosebud and DeCoteau, but instead relied solely on its earlier decisions in Dupris, supra, Erickson, supra, and Long Elk, supra, 565 F.2d 1032 (8th Cir. 1977). 691 F.2d at 421.

Of these decisions, however, Erickson is the only one in which the Eighth Circuit undertook an independent examination of the effect of the 1908 Cheyenne River Act.[6] The decision in Erickson, however, predated both Rosebud and DeCoteau, and relied on narrow and outdated principles which have been discredited in subsequent decisions. Lacking the guidance of the above cases, the Erickson

---

6. In Dupris, the court did not make an independent examination of the 1908 Act, but instead held that the result was controlled by Erickson and other decisions. The majority's discussion was limited to a brief response to the arguments raised in Judge McMillian's thorough dissent. Id at 321-23. In Long Elk, which involved a different surplus lands statute, the court simply stated as dictum that it adhered to the decision in Erickson. 565 F.2d at 1036

court based its decision on what it termed "traditional methods of statutory construction" and overlooked or misinterpreted many factors whose significance has since been made clear in DeCoteau, Rosebud, and other more recent decisions. Despite these shortcomings, the Court of Appeals has repeatedly relied on Erickson and has declined to fully reexamine its continuing validity.[7]

B. The Decision Of The Court Below Is Inconsistent With The Decisions Of This Court.

In Rosebud, this Court held that three separate statutes which opened portions of the original Rosebud Reservation to non-Indian settlement all had the effect of

---

(cont.)
n.10.

7. In contrast, both the federal District Court and the South Dakota Supreme Court have reexamined Erickson and have found that it does not withstand scrutiny. United States v. A Juvenile, supra, 453 F. Supp. at 1201; State v. Janis, supra, 317 N.W. 2d at 137; Stankey v. Waddell, supra, 256 N.W. 2d

disestablishing the portions opened. All three were unilateral acts of Congress which, like the 1908 Cheyenne River Act, provided for the settlement of the lands under the homestead laws and the collection by the federal government of revenues from the sales of the lands, to be held in trust for the Tribe. Act of April 23, 1904, 33 Stat. 254 (Pet. App. H, pp. A43-A53); Act of March 2, 1907, 34 Stat. 1230 (Pet. App. I, pp. A54-A63); Act of May 30, 1910, 36 Stat. 448 (Pet. App. J, pp. A64-A77). One of these - the 1904 Act - was preceded by a cession agreement which was unilaterally modified by Congress, while the 1907 and 1910 Acts did not purport to incorporate cession agreements but, like the 1908 Cheyenne River Act, simply provided for the opening of the lands.

(cont.)
at 120, 124, 127.

The 1908 Cheyenne River Act is nearly identical to the 1907 and 1910 Rosebud Acts - a side-by-side comparison reveals only trivial differences among the three.[8] There is nothing in the text of the Cheyenne River Act, is legislative history, or the surrounding circumstances, to indicate that it was intended to have an effect any different from that of the three contemporaneous statutes opening the Rosebud Reservation.[9]

---

8. The 1908 Act is also virtually identical to the 1910 Act which opened a portion of the Pine Ridge Reservation in South Dakota. Act of May 27, 1910, 36 Stat. 440. The Pine Ridge statute has also been held to have the effect of disestablishment. United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

9. The Cheyenne River Act, like the Rosebud Acts, was sponsored in the Senate by Senator Gamble of South Dakota, in response to the "familiar forces" described in Rosebud, 430 U.S. at 590, 606, 609. United States v. A. Juvenile, supra, 453 F. Supp. at 1176-77. All three statutes were presented to the respective tribes by Inspector

Because there are no logical grounds for distinction among the three statutes, this Court's decision in Rosebud must control.[10] The decisions of the Eighth Circuit on this question and the decision of this Court in Rosebud are thus in direct and irreconcilable conflict.

To allow this situation to persist undermines the authority of this Court and

---

(cont.)
James McLaughlin, who was directed in regard to the Cheyenne River Act to follow the instructions given him as to the 1907 Rosebud Act. See United States v. Dupris, supra, 612 F.2d at 329-30 (McMillian, J., dissenting).

10. The Eighth Circuit in its opinion in Dupris, did not attempt to distinguish the obviously pertinent decision in Rosebud, and referred to Rosebud only for the general principles of construction applicable to such cases. Nevertheless, the court below in the instant case stated that Rosebud was "thoroughly analyzed" in Dupris. While this may well be so, such an analysis is not articulated in the court's opinion in Dupris, and would seem to have been obviated in that case by the court's initial determination that the case was "controlled" by other

erodes the principles laid down in Rosebud. This case may therefore be appropriate for summary reversal of the decision below on the petition, or for vacation and remand in view of Rosebud. See Appawora v. Brough, 431 U.S. 901 (1977).

IV. THE DECISION OF THE COURT OF APPEALS DISREGARDS MANIFEST EXPRESSIONS OF CONGRESSIONAL INTENT IN A MANNER INCONSISTENT WITH THE HOLDINGS OF THIS COURT

A. Congressional Intent To Disestablish Is Plain On The Face Of The Act.

It must be remembered that in determining questions of reservation disestablishment, the intent of Congress controls. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442, 444 (1975). Although the opening of reservation lands to settlement by "sell and dispose" language such as that used in the 1908 Act may not

---

(cont.)
opinions. 612 F.2d at 320.

by itself result in disestablishment, e.g. Rosebud, 430 U.S. at 586-87, reservation status does not survive an opening where, as in Rosebud, congressional intent to disestablish is otherwise apparent. Id. at 586-87. As outlined in the Petition, such an intent with respect to the 1908 Cheyenne River Act is evident on the face of the Act and is confirmed by its legislative history, its historical circumstances, and the subsequent jurisdictional history of the area in question.

1. "Reservations Thus Diminished."

One reflection of this intent is a provision of Section 2 which permitted those Indians who had taken allotments of land in the area to be opened to exchange their lands for tracts selected "within the respective reservations thus diminished." 35 Stat. at 461 (Pet. App., p. A18) (emphasis added). The use of the word "diminished" is an

unambiguous indication that the Act was intended to reduce the size of the reservation by altering its boundaries. See, e.g., United States v. Wounded Knee, 596 F.2d 790, 792-95 (8th Cir.), cert. denied, 442 U.S. 921 (1979); United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122-23 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 111-12 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 281 (D.S.D. 1982); United States v. A Juvenile, 453 F. Supp. 1171, 1190 (D.S.D. 1978), rev'd sub nom. United States v. Dupris, supra; State v. Janis, 317 N.W.2d 133, 136 (S.D. 1982); Stankey v. Waddell, 256 N.W.2d 117, 120 (S.D. 1977). See also Rosebud, 430 U.S. at 613-14 (similar provision highly persuasive); Seymour v. Superintendent, 368 U.S. 351, 354 (1962); Confederated Salish and Kootenai

Tribes v. Namen, 655 F.2d 951, 955 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S.Ct. 314 (1982).

In Erickson,[11] the court below suggested that the phrase "reservations thus diminished" might not refer to the diminution of the reservation boundaries, but to a reduction of the acreage of Indian landholdings in the area. 478 F.2d at 687. Not only does this interpretation ignore both the logical sense of the phrase and the history of the Act, but it has been decisively laid to rest by subsequent decisions of the Eighth Circuit. See United States v. Wounded Knee, 596 F.2d 790, 792-95 (8th Cir.), cert. denied, 442 U.S. 921

---

11. Because the court in the case at hand relied wholly on its previous decision in Dupris, Long Elk, and Erickson, it is the reasoning of those cases which is at issue here.

(1979); Rosebud, supra, 521 F.2d at 99, 111. In Wounded Knee, for example, the court found similar wording in a 1954 statute to be a "crucial phrase" which Congress used to explicitly reduce the boundaries of the Cheyenne River Reservation.

2. "Public Domain".

Another relevant provision of the 1908 Act is Section 9 which, inter alia, provided that Indians residing in certain townships in the area to be opened retained a right to take timber in those townships for domestic purposes "only as long as the lands remain part of the public domain." 35 Stat. at 464 (Pet. App., p. A29) (emphasis added). Clearly, the Act contemplated that the opened lands were to be restored to the public domain, and the decisions of this Court have recognized that restoration to the public domain is synonymous with disestablishment. Rosebud, 430 U.S. at 589

n.5; DeCoteau, supra, 420 U.S. at 426-27, 446, 448-49; Seymour v. Superintendent, supra, 368 U.S. at 358 (1962). The use of the term "public domain" in the 1908 Act is thus an unequivocal indication of an intent to disestablish. Stankey v. Waddell, supra, 256 N.W.2d at 126-27.

The court below discounted the public domain language in Section 9, suggesting that Congress may have intended that only the townships referred to in that proviso were to be restored to the public domain. Erickson, 478 F.2d at 687-88. This suggestion ignores the logic of the language used in Section 9, which clearly indicates that this proviso did not by itself restore lands to the public domain but instead referred to a restoration occurring elsewhere in the Act - i.e., the sections providing for sale and disposal of the unallotted lands. There is no indication

in the Act or its legislative history that the restoration was restricted to the area referred to in Section 9, or that the disposition of those lands was to proceed any differently from that of other lands in the opened area. See A Juvenile, supra, 453 F. Supp. at 1194; 56 I.D. 330, 338 (1920); 45 Cong. Rec. 739 (1910).

3. School Lands.

Further confirmation of disestablishment intent is found in the "school lands" provision of Section 7, which specified that the sixteenth and thirty-sixth sections of each township were not to be subject to homestead entry but instead were to be granted to the States for school purposes. 35 Stat. 463 (Pet. App., pp. A25-A26). The significance of such a provision has been fully explained by this Court in Rosebud with regard to virtually identical provisions in the three Rosebud Acts. 430 U.S. at 599-

601, 608 n.36. Just as in Rosebud, it is clear that Congress included this provision in order to implement a grant to the states which was made under the states' Enabling Act but deferred until the reservation was "extinguished" and restored to the public domain. See A Juvenile, supra, 453 F. Supp. at 1192; 42 Cong. Rec. 7005 (1908); 45 Cong. Rec. 738-39 (1910). However, without discussing the explanation in Rosebud, the court below dismissed the school lands provision, intimating that it was of "minimal importance." Dupris, 612 F.2d at 321.

4. Intoxicants Provision.

Another pertinent section of the 1908 Act is a provision in Section 8, added by amendment in 1910, which prohibited the introduction of intoxicating liquors into the opened area for a period of twenty-five years. Act of February 17, 1910, 36 Stat.

196. This provision is identical to a provision in the Rosebud Act of the same year, which the Court interpreted to "reflect strongly" an intent to disestablish. 430 U.S. at 613-14. As explained in Rosebud, because there was already an existing statutory ban on the introduction of intoxicants into Indian country, the "most reasonable inference" from the inclusion of this provision is that Congress understood that the opened areas would no longer be part of the reservation. Rosebud at 613. Nevertheless, the Eighth Circuit found that the provision should be given "very little weight," apparently reasoning that Congress could have believed the amendment to be surplusage, but added it anyway at the request of the Indians. Dupris at 321. However, this assertion finds no suport in the

legislative history,[12] which instead clearly reflects an understanding on the part of Congress that the federal laws prohibiting liquor sales in Indian country would not apply without the amendment. 45 Cong. Rec. 1769-70 (1910). See also A Juvenile, supra, at 1197-98; H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910). Thus, the liquor law extension, like the other statutory provisions, supports the conclusion that the 1908 Cheyenne River Act was intended to disestablish the portion of the original reservation opened by the Act.

---

12. The legislative history cited by the United States, from which the court's conclusion is derived, does not pertain to the 1910 amendment, but instead to a report of a separate, unsuccessful bill aimed at the opening of the diminished reservation left unopened by the 1908 Act. See S.Rep. No. 518, 61st Cong., 2d Sess. at 4-5 (1910). The materials pertinent to the 1910 amendment make no reference to a request by the Tribes.

B. The Legislative History of the 1908 Act and the Surrounding Circumstances Confirm that Congress Intended to Disestablish the Areas to be Opened.

In 1907, the "familiar forces" described in DeCoteau and Rosebud began to work on the Cheyenne River and Standing Rock Reservations, pressing for an opening of the surplus lands of the reservations for non-Indian settlement. United States v. A Juvenile, supra, 453 F. Supp. at 1176-77. In December 1907, Senator Gamble of South Dakota introduced a bill to open parts of the two reservations (S. 1285, 60th Cong., 1st Sess. (1907)), and the Commissioner of Indian Affairs directed Indian Inspector James McLaughlin to proceed to the two reservations to explain the proposal to the Indians and to solicit their views, as he had with respect to the 1907 Rosebud Act. Dupris, 612 F.2d at 329-30 (McMillian, J., dissenting). A Juvenile at 1177-78.

The materials surrounding Inspector McLaughlin's councils with the Indians clearly indicate that both the Inspector and the Indians understood that an opening of portions of the two reservations would result in disestablishment. Both McLaughlin and the Indians at both reservations referred to the proposed opening in terms of cession, relinquishment, and reduction of the reservations, and described the portion to be left unopened as a "diminished reservation." S. Rep. No. 439, 60th Cong., 1st Sess., pt. 2 at 5-13 (1908); H.R. Rep. No. 1539, 60th Cong., 1st. Sess. at 9-17 (1908). See also A Juvenile at 1179-83. Equally explicit is McLaughlin's written report of these conferences, which contains numerous references to new boundary lines, diminished reservations, and the cession and relinquishment of lands, and leaves no doubt as to the commonly understood effect of the

opening legislation. S. Rep. No. 439, supra, pt. 2 at 1-4; H.R. Rep. No. 1539, supra at 5-8.

Curiously, the court below found the statements in McLaughlin's report to be "ambiguous" because the Indians were in an "inferior bargaining position," and found further ambiguity in the fact that McLaughlin sometimes referred to the disposal of the lands as an "opening." Dupris at 321-22. First, however, it is not readily apparent what effect the position of the Indians would have on the clarity of McLaughlin's otherwise unambiguous statements. Second, this Court in Rosebud has made it clear that "opening" and "disestablishment" are not mutually

exclusive terms and that disestablishment may in fact result from an opening.[13]

Inspector McLaughlin's report, together with the transcript of his councils with the Indians, was included in the committee reports of both the Senate and House as a supplementary report and his understanding of the bill was thus evidently shared by the committees. S. Rep. No. 439, supra, pt. 2; H.R. Rep. No. 1539, supra at 5-28. The committee's perception of the

---

13. The Eighth Circuit in Dupris emphasized the absence of any cession agreement with the Indians, a factor which it apparently believed to be of substantial importance. 612 F.2d at 322. Rosebud, however, leaves no doubt that Congress knew it could unilaterally terminate reservation status and that the presence or absence of Indian consent is therefore not dispositive. 430 U.S. at 587-88, 598 and n.20. In this respect, the circumstances of the 1908 Cheyenne River Act do not differ from those of the 1910 Rosebud Act, where Inspector McLaughlin did not negotiate an agreement but reported back the general concurrence of the Indians in the opening.

bill is also clear from the text of the reports, both of which referred to the unopened areas as "the reservations thus diminished" and "the reduced reservation." S. Rep. No. 439 at 4, 5; H.R. Rep. No. 1539 at 3. Thus, the legislation was presented to Congress by the committees with the understanding that it would result in the disestablishment of the areas to be opened, and Congress considered the bill in that context. There is no indication in the limited floor debate that Congress intended any different result from that described in the committee report.[14] It must therefore

---

(cont.)
430 U.S. at 610.

14. To the contrary, the debate in the House explicitly confirms that Congress believed that the grant of school lands to the States was made to implement the Enabling Act, just as were the grants in the Rosebud Acts. 42 Cong. Rec. 7005 (1908).

be presumed that the intent to disestablish was carried forward into the Act as passed.

The lack of extensive legislative debate on the 1908 Act is hardly surprising in light of the historical context of the Act. Congress had, in the years immediately preceding the passage of the Cheyenne River Act, passed three similar surplus lands acts with respect to other reservations in South Dakota, and the effect of such statutes must have been well understood.[15] See Act of April 23, 1904, 33 Stat. 254 (Rosebud Reservation); Act of April 21, 1906, 34 Stat. 124 (Lower Brule Reservation); Act of March 2,

---

15. In the previous decade, Congress had also provided for the disestablishment of two other reservations in South Dakota by way of statutes ratifying cession agreements. Act of March 3, 1891, 26 Stat. 1035 (Lake Traverse Reservation); Act of August 15, 1894, 28 Stat. 286 (Yankton Reservation). See, e.g., DeCoteau v. District County Court, 420 U.S. 425 (1975) (Lake Traverse); State v. Williamson, 87 S.D. 512, 211 N.W.2d 182 (1973) (Yankton).

1907, 34 Stat. 1230 (Rosebud Reservation). Just as the 1907 and 1910 Rosebud Acts were examined by this Court in the context of the 1904 Rosebud Act, so must the 1908 Cheyenne River Act be viewed in the context of the other statutes opening reservation land in South Dakota.[16] See Rosebud, 430 U.S. at 606 n.30; Dupris, supra 612 F.2d at 326-27 (McMillian, J., dissenting); United States ex rel. Cook v. Parkinson, 525 F.2d at 123.

This Court has emphasized that treaties and statutes involving Indian tribes "cannot be interpreted in isolation but must be read in light of the common notions of the day

---

16. The 1906 Lower Brule Act, like the Rosebud Acts already discussed, reduced the size of the affected reservation. Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 278 (D.S.D. 1982). Congress also diminished the size of the Pine Ridge Reservation in another similar act in 1910. United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

and the assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). In this regard it must be remembered that the 1908 Cheyenne River Act and the Rosebud Acts were all enacted during a period when the prevailing federal policy favored the reduction in size of Indian reservations. See, e.g., Montana v. United States, 450 U.S. 544, 559 n.9 (1981); Draper v. United States, 164 U.S. 240, 246 (1896); Hollister v. United States, 145 F. 773, 777 (8th Cir. 1906); [1906] Comm'r Indian Affairs Ann. Rep. 80-81. It is also important to note that at the time the Cheyenne River statute in question was enacted, the extinguishment of Indian title and the alienation of land to non-Indians were commonly understood to terminate the reservation status of the lands involved. See, e.g., Clairmont v. United States, 225 U.S. 551, 558 (1912); Hollister v. United

States, supra at 777-78. In this setting, it is inconceivable that Congress would enact several virtually identical statutes over the same period of time, and under the same circumstances, and intend them to have radically different results. There is nothing in the history of the 1908 Act to suggest that its purpose was any different from that of similar statutes opening other South Dakota Reservations.

C. The Subsequent Treatment of the Opened Area.

The subsequent treatment of the area in question serves only to bolster the conclusion that the 1908 Act had the effect of disestablishment. In 1911, shortly after the area had been opened by presidential proclamation pursuant to the Act, the federal District Court held that the Act had the effect of diminishing the boundaries of the Cheyenne River Reservation by excluding the area opened to settlement, and that the

area was therefore within the jurisdiction of the State. United States v. LaPlant, 200 F. 92 (D.S.D. 1911). The historical record establishes that the State and counties assumed civil and criminal jurisdiction over unallotted lands in the opened area shortly after the opening and continued to exercise jurisdiction without interruption until the Erickson case in 1972. A Juvenile, supra, 453 F. Supp. at 1199. This exercise of jurisdiction was reaffirmed in a series of opinions of the state Supreme Court. See State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W. 2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

The historical record also reveals that the officials of the Department of the Interior charged with the administration of the affairs of the Cheyenne River Indians, understood that the opened portion of the

original Cheyenne River Reservation was no longer in reservation status. Dozens of administrative documents, including regulations, reports, decisions, and letters, unambigously refer to the opened area as the "former" reservation or as "ceded" lands, or described the remaining area as the "diminished reservation." See e.g., Letter from Secretary of Interior, S. Rep. No. 819, 60th Cong., 2d Sess. at 2 (1909); Regulations, 47 I.D. 340, 340 (1920); Charlotte Strommer, 48 I.D. 453, 453 (1922); Letter from Acting Secretary of Interior, S. Rep. No. 554, 67th Cong., 2d Sess. at 3, 4 (1922); Letter from Acting Secretary of Interior, S. Rep. No. 1115, 68th Cong., 2d Sess. at 2 (1924); Restoration to Tribal Ownership, 56 I.D. 330, 338 (1938). This understanding is also evident from several Orders of Restoration issued by the Secretary of the Interior under the Indian Reorganization Act

of 1934, 25 U.S.C. §§ 463 and 467. See discussion, ante, at n.4. These orders restored opened but unsold lands to tribal ownership under Section 3 of the Act and declared the lands to be "added to and made a part of the existing Reservation" under Section 7 of the Act, and thus unmistakably reflect the understanding of the Secretary of the Interior that the opened lands were no longer part of the reservation.[17] A Juvenile, supra, 453 F. Supp. at 1194; Stankey v. Waddell, supra, 256 N.W.2d at 127. This consistent, longstanding interpretation of the effect of the 1908 Act by the government agency responsible for the administration of the Act is entitled to great deference. See, e.g., E.P.A. v. National Crushed Stone Assn., 449 U.S. 64, 83 (1980); United States v. National

---

17. In addition, both the 1941 and 1952 orders contain references to the "boundaries of the former Cheyenne River Reservation."

Association of Securities Dealers, Inc., 422 U.S. 694, 718-19 (1975); Leary v. United States, 395 U.S. 6, 25 (1969).

Finally, it is apparent that Congress itself understood that it had reduced the size of the Cheyenne River Reservation. In the debate on the 1910 amendment to the 1908 Act, Senator Gamble, the original sponsor of the Act, stated that "[b]y the very act itself ... the lands become a part of the public domain." 45 Cong. Rec. 739 (1910). In subsequent statutes regarding the time allowed to homesteaders for payments for the opened lands, Congress referred to the opened area as "land which was formerly a part of the Cheyenne River Indian Reservation," as the "former" reservation, and as "ceded" lands. Act of April 13, 1912, 37 Stat. 84; Act of March 3, 1925, 43 Stat. 1184; Act of February 14, 1931, 46 Stat. 1107. There are numerous other such

references in congressional reports and debates. See, e.g., S. Rep. No. 1115, 68th Cong., 2d Sess. at 2 (1925); H.R. Rep. No. 694, 67th Cong., 2d Sess. (1922); 48 Cong. Rec. 2335 (1912); S. Rep. No. 819, 60th Cong. 2d Sess. at 1 (1909).

The commonly shared presumption of Congress, the executive branch, and the lower federal courts ought to carry considerable weight in a determination of the effect of the 1908 Act.[18] See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). That presumption not only serves as evidence of congressional intent but has established perceptions and expectations as to the allocation of jurisdiction over the affected area which should not be overturned

---

18. The subsequent history of the area was only briefly touched on in Erickson, at 688, and not at all in Dupris or Bartlett. In none of the cases did the court below acknowledge that it was reversing over sixty years of judicial precedent.

by the strained reading given to the Act by the Court of Appeals. See Rosebud at 604-05.

CONCLUSION

The decision of the court below cannot be reconciled with the decisions of this Court and is in direct opposition to the decisions of the South Dakota Supreme Court. Because of the significance of the case to the governments and inhabitants of the area in question, and the implications which it carries for the disposition of similar cases throughout the nation, the amici counties urge that the petition for certiorari be granted, or, in the alternative, that the decision of the Court of Appeals be vacated in view of this Court's decision in Rosebud.

Respectfully submitted,

William W. Shakely
Tobin Law Offices, P.C.
Suite 1113
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009

Tom D. Tobin
Tobin Law Offices, P.C.
422 Main Street
Winner, South Dakota 57580